Nos. 71-1016 and 71-1040

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

MOTION FILED

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No. 71-1016

FEDERAL POWER COMMISSION,
Petitioner,
v.
LOUISIANA POWER & LIGHT CO., ET AL.,
(The Collateral Proceeding)
Respondents.

FEDERAL POWER COMMISSION,
Petitioner,
v.
LOUISIANA POWER & LIGHT CO., ET AL.,
(The Curtailment Proceeding)
Respondents.

No. 71-1040

UNITED GAS PIPE LINE CO. AND PENNZOIL UNITED, INC.,
Petitioners,
v.
LOUISIANA POWER & LIGHT CO.,
Respondent.

UNITED GAS PIPE LINE CO.,
Petitioner,
v.
LOUISIANA POWER & LIGHT CO., ET AL.,
(FPC Opinion 606)
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION OF HUMBLE OIL & REFINING COMPANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE HUMBLE OIL & REFINING COMPANY IN OPPOSITION

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MOTION OF HUMBLE OIL & REFINING COMPANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Humble Oil & Refining Company ("Humble") hereby respectfully moves the Court for leave to file the attached "Brief of Amicus Curiae Humble Oil & Refining Company in Opposition." Such brief is respectfully submitted in opposition to this Court's review of only *one* of the questions presented in the petition for writs of certiorari filed by the Solicitor General of the United States on behalf of the Federal Power Commission ("Commission") in No. 71-1016, *Federal Power Commission* v. *Louisiana Power & Light Co., et al.* (The Collateral Proceeding), *i.e.* (Pet. p. 5):

> "Whether the Federal Power Commission, rather than the courts, should make the initial determination of the Commission's jurisdiction to issue a certificate of public convenience and necessity authorizing a jurisdictional interstate pipeline company to continue to operate certain pipeline facilities."

The attached brief is also respectfully submitted in opposition to this Court's review of only *one* of the questions presented in the petition for writs of certiorari filed jointly by United Gas Pipe Line Company and Pennzoil United, Inc. (hereinafter collectively referred to as "United") in No. 71-1040, *United Gas Pipe Line Co.* and *Pennzoil United, Inc.* v. *Louisiana Power & Light Co.*, *i.e.* (Pet. p. 2):

> "Whether a court has jurisdiction to determine the Federal Power Commission's jurisdiction over facilities being operated by an interstate pipeline when the jurisdictional issue presented to the court is at that very time being litigated at the Commission."[1]

[1] Humble *emphasizes* that it does *not* oppose either the Commission's or United's petitions for writs of certiorari to the extent that

[Footnote continued on next page]

The Solicitor General of the United States on behalf of the Commission (No. 71-1016) and counsel for United (No. 71-1040) have consented to Humble's filing the attached brief *amicus curiae*. Counsel for respondent Louisiana Power & Light Company ("LP&L") has also consented to the filing of the attached brief. Humble respectfully submits that the consent of these principal parties satisfies the intent of Rule 42(1) of the Rules of this Court which provides in pertinent part that a "brief of an *amicus curiae* prior to consideration . . . of the petition for writ of certiorari, filed with the consent of the parties, . . . *may be filed* only if submitted a reasonable time prior to the consideration . . . of the petition for writ of certiorari" (emphasis added). Humble's interest in these proceedings stems from the Fifth Circuit's decision in *Louisiana Power & Light Co.* v. *United Gas Pipe Line Co., et al.*, No. 71-2550 (judgment entered, January 14, 1972)[2] that it had the authority to determine, and did determine, that United's "Green System" is not subject to the Commission's jurisdiction under the Act. Since the only parties to that proceeding were United, LP&L and the Commission, it is respectfully submitted that their consent should satisfy the purpose of Rule 42(1).

[Footnote continued from previous page]

such petitions seek this Court's review of the *important question* of whether the Commission has the authority, under the Natural Gas Act ("Act"), Act of June 21, 1938, as amended, 52 Stat. 821, as amended (1938), 15 U.S.C. §§ 717-717w, to, in times of natural gas shortage, allocate the interstate gas supplies of an interstate pipeline company between direct and resale customers of such company.

[2] United Apps. A and B, pages 1a-29a. With the filing of its petition for writs of certiorari, United submitted several appendices including, among other things, the opinion and judgment below. References herein shall be to United's appendices.

Humble's interest in these proceedings arises from its status as a producer and seller of substantial volumes of natural gas in intrastate commerce to United which is delivered into United's Green System. In addition, Humble is also a producer and seller of substantial volumes of natural gas to United in interstate commerce. In *United Gas Pipe Line Co.*, FPC Docket No. CP71-89, United applied to the Commission for a certificate of public convenience and necessity under Section 7(c) of the Act, 15 U.S.C. § 717f(c) (United App. D, pp. 48a-49a), authorizing it to continue operating, *inter alia*, its Green System on an interstate basis. Humble intervened in FPC Docket No. CP71-89 and actively participated therein opposing Commission assertion of jurisdiction over the Green System. On February 9, 1972, the Commission, Commissioner Carver dissenting, issued its Opinion No. 610, "Opinion and Order Finding Jurisdiction and Remanding Proceeding for Receipt of Additional Evidence" in FPC Docket No. CP71-89, in which it determined that it had jurisdiction over United's Green System (United App. F, pp. 91a-131a). That determination may have a substantial impact upon Humble's intrastate sales into United's Green System.

Humble believes that the Fifth Circuit had the authority to, and correctly decided, the jurisdictional status of United's Green System, on the basis of the record before it, and under the Act and guiding precedent. Humble respectfully submits that its participation herein as *amicus curiae* will materially assist the Court in its determination of whether to take certiorari on the question of whether the Fifth Circuit acted reasonably in the circumstances by declining to invoke the doctrine of "primary jurisdiction," and by determining that the Green System is not subject to the Commission's jurisdiction under the Act. It is respectfully submitted that

the brief which Humble is requesting permission to file herein will contain a complete argument on this question.

Respectfully submitted,

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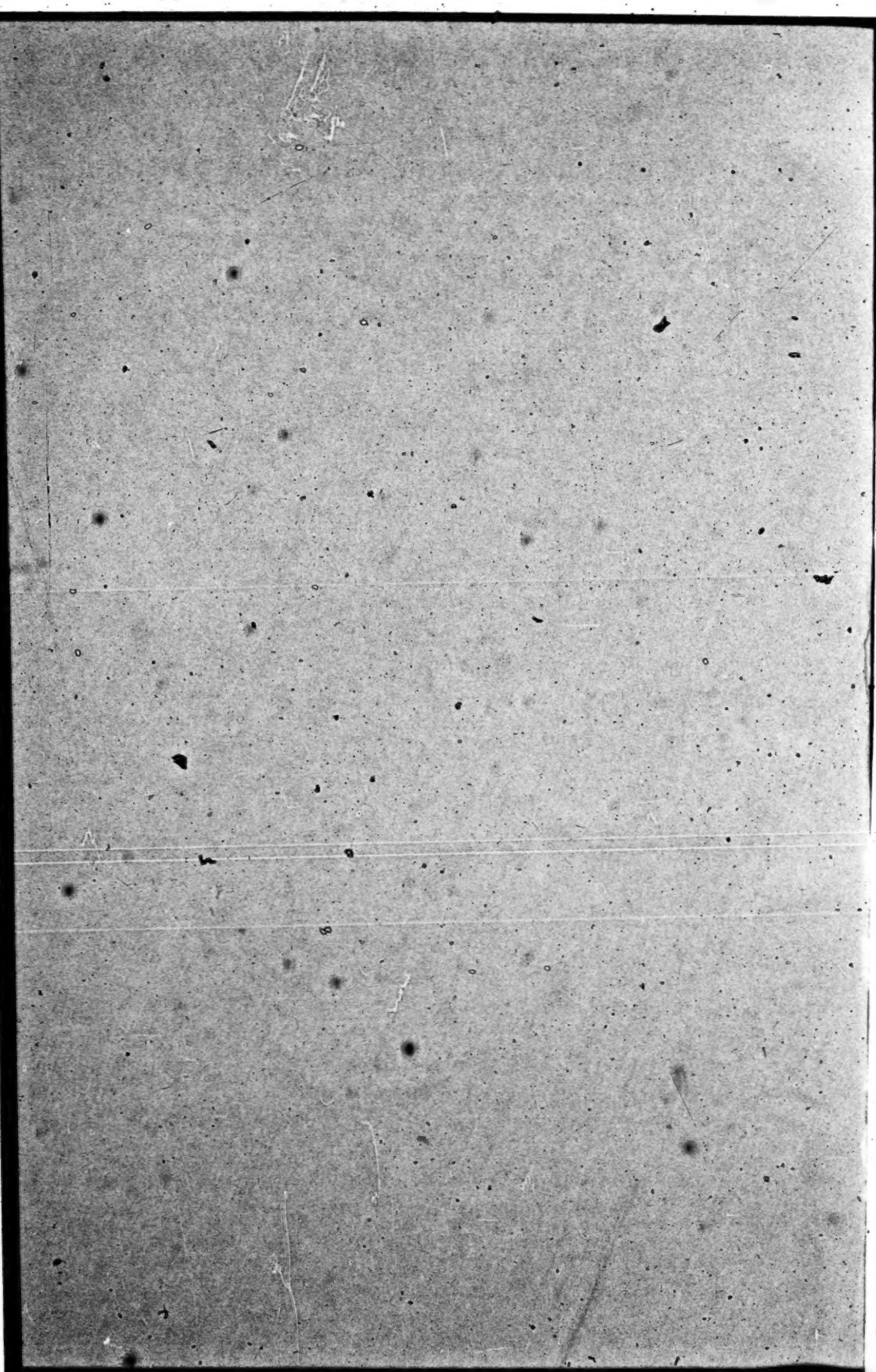

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BRIEF OF AMICUS CURIAE HUMBLE OIL & REFINING COMPANY IN OPPOSITION

INTRODUCTION

Humble respectfully submits herewith its brief *amicus curiae* opposing the petitions for writs of certiorari filed by the Commission and by United *only* to the extent that such petitions seek this Court's review of the Fifth Circuit's decision in *Louisiana Power & Light Co.* v. *United Gas Pipe Line Co., et al.* (see Motion *supra*, p. 2a); holding that it had the authority to determine that United's Green System is not subject to the Commission's jurisdiction under the Act (United App. A, pp. 22a-25a).[1]

The petition for writs of certiorari filed by United adequately sets forth the opinions below, the jurisdiction of this Court, and statutes involved, to the extent relevant to this question, and, in the interest of brevity, Humble adopts those statements.

STATEMENT

The petition for writs of certiorari filed by the Commission adequately summarizes the proceedings relevant to the question of whether the Court below properly exercised its discretion in declining to invoke the doctrine of primary jurisdiction and in determining that the portion of United's Green System which serves LP&L's

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[1] The extent of Humble's opposition to the Commission's and United's petitions for writs of certiorari is set forth in its Motion seeking leave to file this brief (Motion, *supra*, p. 1a). Humble again *emphasizes* that it does *not* oppose the Commission's and United's petitions for writs of certiorari to the extent that such petitions seek review of the *important question* of the Commission's authority to allocate the available gas supplies of jurisdictional pipeline companies in times of gas supply shortage.

Nine-Mile Point generating station was not subject to the Commission's jurisdiction under the Act (Commission Pet. pp. 9-11). Humble adopts such statement.

QUESTION PRESENTED

Was the Court below required by the doctrine of "primary jurisdiction," in the circumstances of the case at bar, to refrain from deciding the purely legal question of whether United's Green System was subject to the Commission's jurisdiction under the Act, where: (1) both the Court and the Commission had before them the essential operating characteristics of the pipeline facilities involved developed on separate records and in the Court proceedings the relevant facts with respect to the jurisdictional issue were developed with the aid and participation of the Commission; (2) the determination of the question of jurisdiction merely required the application of existing law to those facts and did not involve any Commission expertise, skill, or discretion; (3) the question of jurisdiction did not require Commission consideration of any national policy or other transcending public policy considerations; and (4) the question of primary jurisdiction was fully briefed to the Court by all parties to the proceeding, including the Commission?

ARGUMENT

A. The Court Below Was Not Required by the Doctrine of Primary Jurisdiction, in the Circumstances of This Case, to Refrain From Deciding the Question of Whether United's Green System Was Subject to the Commission's Jurisdiction Under the Act and Acted Reasonably in the Circumstances in Correctly Deciding Such Question

The fundamental question presented by the petitions for writs of certiorari reduces itself to whether the Court below was required, in the circumstances of *this* injunction proceeding, by the doctrine of primary jurisdiction,

to refrain from deciding, on the basis of the record made in a trial court of competent jurisdiction, the *purely legal* question of whether United's Green System is jurisdictional under Section 1(b) of the Act, 15 U.S.C. § 717(b) (United App. D, p. 43a). The answer to this question must be made in the context of the facts of *this* particular case, *i.e.*: (1) that the Court below had before it a record developed in a trial court of competent jurisdiction relating to the essential operating characteristics of the pipeline facilities involved; (2) in the Court proceedings the relevant facts with respect to the jurisdictional issue were developed with the aid and participation of the Commission; (3) that the determination of the question was solely one of law involving the application of the Act and guiding precedent to the facts of record; (4) that the determination of the question did not require any Commission expertise, skill or discretion; (5) that the question itself did not involve any overriding public policy considerations upon which the Commission should have the first opportunity to pass; and (6) that the question of primary jurisdiction was fully briefed and argued to the Court below by all parties to the proceeding, including the Commission. Humble respectfully submits that the Court below not only had the authority to and correctly decided such question but also that it acted reasonably in the circumstances.

This Court has often considered the doctrine of primary jurisdiction. The application of the doctrine requires the exercise of sound discretion by the Court involved, having regard to the particular circumstances of each case. The "principal reason behind the doctrine is recognition of the need for orderly and sensible coordination of the work of agencies and of courts" 3 Davis, *Administrative Law Treatise*, § 1901. The "principal criterion in deciding whether the doctrine is applicable . . . usually is *judicial appraisal* of need or lack of need for

resort to administrative judgment" (*id.* at § 19.09, emphasis added).

In *Far East Conference* v. *United States*, 342 U.S. 570, 574-575 (1952), this Court reiterated the pertinent criteria to be applied in determining whether a court should invoke the doctrine of primary jurisdiction, when it stated (emphasis added):

> "*The Court thus applied a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over.* This as [sic] so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure."

The case at bar clearly did not raise "issues of fact not within the conventional experience of judges." Nor did it require the "exercise of administrative discretion." On the contrary, the question of jurisdiction presented to the Court below was solely one of law requiring the application of the Act and guiding precedent to the undisputed facts of record.[2]

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[2] It is important to note that United characterized its filing in United Gas Pipe Line Co., FPC Docket No. CP71-89, (see Motion, *supra*, p. 4a), the Commission proceedings involving this question, as its *"Florida Parishes"* compliance case, United Gas Pipe Line Co., FPC Docket No. CP62-161, 30 F.P.C. 560, *reh. denied*, 31 F.P.C. 1152 (1964), *aff'd.*, Louisiana Pub. Serv. Comm'n. v. FPC, 359

[Footnote continued on next page]

It is all important to recognize that the Commission voluntarily and actively participated in the proceedings below and aided in the development of the record on the jurisdictional question. Thus, the Commission responded to the pleadings filed in the proceedings below and moved to dismiss the injunction proceedings. The Commission participated fully in the cross-examination of United's witnesses on the flow of gas in the Green System, introduced evidence on the type of gas flowed into the Green System (*i.e.*, gas sold pursuant to certificates of public convenience and necessity) and introduced into evidence "the entire excerpts from the proceedings [before the Commission] in the certificate" case (R. 300).

In these circumstances, reference to the Commission was rendered unnecessary. Justice Frankfurter well summarized this rule of law and the precedent upon which it is founded in a somewhat different though analogous context dissenting in *Federal Maritime Board v. Isbrandtsen Company*, 356 U.S. 481, 521 (1958):

> "Contrariwise, where a decision of a case depends on determination of a question of law as such, either because of explicit statutory outlawry of some specific conduct or by necessary implication of judicial power because not involving the exercise of administrative discretion or the need of uniform application of specialized competence, the doctrine of primary jurisdiction has no function, because there is no occasion to refer a matter to the administrative agency. Great Northern R. Co. v. Merchants Elevator Co., 259 U.S. 285, 42 S.Ct. 477, 66 L.Ed. 943 (reaffirmed in United States v. Western Pacific R. Co., 352 U.S. 59, 69, 77 S. Ct. 161, 167, 1 L.Ed. 2d 126); Texas & Pacific R. Co. v. Gulf, C. & S. F. R. Co., 270 U.S. 266, 46 S.Ct. 263, 70 L.Ed. 578;

[Footnote continued from previous page]

F.2d 525 (5th Cir. 1966), *cert. denied*, 385 U.S. 833 (1966). The Circuit below is the Circuit which decided *Florida Parishes* on appeal from the Commission's decision.

> Civil Aeronautics Board v. Modern Air Transport, Inc., 2 Cir., 179 F.2d 622, 624-625; see Davis, Administrative Law, 666-668."

The Court below knew of the existence of the certificate proceedings pending before the Commission in FPC Docket No. CP71-89 (United App. A, p. 4a). It stated, however, that it "must determine whether minor diversions of interstate gas have converted a wholly state-contained pipeline system to an interstate facility" (*id.* p. 2a). The Court below continued that "until recently, all of the gas delivered to [LP&L's Nine-Mile] station only traveled in a pipeline system, designated the 'Green System,' which gathered and disposed of gas wholly within the confines of the State of Louisiana. However, in 1970 United chose to divert 2.6% of the gas supplied under its Nine-Mile Station contract into the Green System from its interstate system, designated the 'Black System'" (*id.* pp. 3a-4a). In this regard, the Court below stated that it was "particularly significant that this minor amount of interstate gas had been introduced *into* the Green system, and that no intrastate gas could flow *from* the Green system into the Black system because of the pressure differential between the systems" (*id.* p. 22a, emphasis in original). The Court thus held that these facts, among others, did not render the Green System jurisdictional under the Act, the decision of the Fifth Circuit in *Florida Parishes* (*supra*, pp. 5-6, n. 2), or the decisions of this Court in *People of the State of California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965), or *FPC* v. *Amarada Petroleum Corp.*, 379 U.S. 687 (1965), and stated (United App. A, pp. 23a-25a, emphasis added):

> "In determining whether a particular gas delivery system is subject to federal regulation . . . [the] court must examine 'the anatomy of the pipeline system to discover the channel of constant flow' to see if, in fact, gas crosses a state line at any stage of its movement from well-head to ultimate consump-

tion. If it does, it is interstate gas (citations omitted).

"The lower court held that this analysis of constant flow required agency expertise and that it should refuse to exercise its jurisdiction and require exhaustion of administrative remedies. *Without adopting any sweeping or dogmatic contrary rule for every imaginable case, we disagree in the case at bar. The solution to the legal problem here depends upon simple flow mechanics, which are demonstrated in this record by uncontradicted evidence. It requires no expertise to determine that the channel of constant flow, insofar as the gas passed through and consumed from the Green system is concerned, is essentially within the State of Louisiana.*

* * * * *

". . . the flow of gas from the Black system into the Green system in the case at bar is occasional and irregular, as well as minimal. The Green system, as an entire and separate unit, is physically located in and functions entirely in Louisiana. Therefore, the undisputed facts show that the channel of constant flow is an intrastate and not an interstate channel. The regulation of the Green system is substantially and essentially a localized matter committed to Louisiana's jurisdiction (footnote omitted)."

The Court's decision is neither more nor less of a legal determination than a reviewing court could make under Section 19(b) of the Act, 15 U.S.C. § 717r(b) (United App. D, pp. 52a-54a), which empowers a reviewing court to "affirm, modify, or set aside [a Commission] order." [3]

[3] It would appear that the courts are not precluded from passing upon the merits of legal questions which have not been passed upon by the agency involved where there is a record upon which a legal conclusion may be rendered and "persuasive reasons" exist for such action. *Cf.* Permian Basin Area Rate Cases, 390 U.S. 747, 823-824 (1968).

The Court below did not arrogate to itself a purely administrative determination. Nor did the decision which the Court rendered require any expertise, skill or discretion on the Commission's part. Certainly, it did not involve the determination of a question with transcending public policy considerations.[4] The Court's action was not only eminently reasonable in the circumstances of an injunction proceeding but clearly comported with the rule of law that the doctrine of primary jurisdiction performs no office where, as here, the question involved is a legal one traditionally considered to be within the province of the appellate courts by the "necessary implication of judicial power" (*Federal Maritime Board* v. *Isbrandtsen Company, supra*, 356 U.S. p. 6 521).

B. Petitioners Have Failed to Demonstrate any Legal or Policy Reason Requiring This Court to Review the Issue Presented With Respect to the Court's Authority to Determine the Jurisdictional Status of the Green System

The question presented in the so-called "curtailment case" (Commission Pet. pp. 7-11) of the scope of the Commission's authority to allocate the gas supplies of jurisdictional natural gas pipeline companies in times of gas supply shortage is obviously one of fundamental importance to the sound administration of the Act. The answer to this question will have a national impact on the natural gas pipeline industry and the domestic and industrial consumers which such industry serves. However, no such comparable argument can legitimately be made with respect to the narrow legal question of wheth-

[4] It should be noted that the Fifth Circuit (the same circuit that decided the case at bar) applied the doctrine of primary jurisdiction in *J. M. Huber Corp.* v. *Denman*, 367 F.2d 104 (5th Cir. 1966). There, that Circuit invited the parties to invoke the Commission's jurisdiction for a determination of whether it had jurisdiction over royalty payments for natural gas produced and sold in interstate commerce, a question which the Fifth Circuit considered to involve transcending public policy considerations and on which there was no record before the Fifth Circuit.

er the Court below abused its discretion in declining to invoke the doctrine of primary jurisdiction and in determining the jurisdictional status of a relatively small segment of United's huge pipeline system. This question simply does not present any issue of fundamental importance to the Commission's administration of the Act. Further, this Court's determination of the issue of primary jurisdiction does not involve the national regulatory question presented by the curtailment case. A denial of certiorari on the jurisdictional issue does not preclude consideration of the curtailment issue since the latter issue arises on facts relating to service to LP&L's Sterlington Station which takes deliveries from United's interstate system. Conversely, the curtailment issue is not dependent upon the jurisdictional status of United's facilities serving LP&L's Nine Mile Point Station.

Nor does the Fifth Circuit's decision on the question of primary jurisdiction adversely affect the essential role of the agency and the court in the administrative process. Indeed, the decision of the Court below does not conflict with the established doctrine on the question of primary jurisdiction as reflected in this Court's opinions or in the opinions of the various Circuit Courts of Appeals. Rather, the decision of the Court below, in the circumstances of this case, is completely consistent with the doctrine of primary jurisdiction, the application of which must, in any event, be examined on an *ad hoc* basis having regard to all relevant facts.

The important question, which this Court may ultimately decide to consider, as to the Commission's authority over the allocation of available gas supplies of interstate pipeline companies in times of shortage should not be undercut by the narrow legal question of whether the Court below abused its discretion in declining to invoke the doctrine of primary jurisdiction. The purpose of the doctrine of primary jurisdiction, *i.e.*, to defer to

a regulatory agency, to pass upon matters which arguably require its expertise, was clearly satisfied in the circumstances of this case. Here, the Commission exercised full opportunity to develop all of the essential facts of record before the Court. Moreover, the Commission has now had an opportunity to express its views on the jurisdictional status of the Green System. If its Opinion No. 610 was lawfully issued (see, Commissioner Carver's dissent, United App. F, pp. 127a-131a), the Commission's views are subject to judicial review in the normal course.

United asserts that the "Fifth Circuit decided an important issue of Commission jurisdiction which was not before it for review and which, although pending before the Commission in the certificate proceeding [FPC Docket No. CP71-89], had not then been decided by the Commission" (United Pet. pp. 12-13). In the first place, Humble respectfully submits that the question presented here is not an "important issue of Commission jurisdiction" either individually or in comparison with the question presented in the curtailment case since it deals with the Commission's jurisdiction over a relatively small segment of United's huge interstate pipeline system, which segment has been regulated for many years in the public interest by the Louisiana Public Service Commission. Thus, even assuming the Commission does not have jurisdiction over such System, the Louisiana Public Service Commission does and regulates such System to the extent of its constitutional authority. Secondly, the question of the Commission's jurisdiction over the Green System was properly before the Fifth Circuit for review since LP&L's complaint for an injunction against United's curtailing its gas supply at its Nine-Mile Point Station rested, in part, upon its assertion that the Green System was not subject to Commission jurisdiction. Thirdly, it is indeed true that the Commission had not decided the certificate question in FPC Docket No. CP71-89 when the Court decided such question. However, it will be recalled that this

was an *injunction suit* involving vital gas supplies where expedition was required by the public interest. The Commission had the certificate proceeding in FPC Docket No. CP71-89 before it for *seven months* before the case was set for hearing. *Ten months* after the case was set for hearing and one month after the Fifth Circuit had decided the jurisdictional issue the Commission rendered a determination on such question.[5]

United further asserts that the "Fifth Circuit took an incomplete record (footnote omitted) . . . and made factual determinations which had never been passed upon by either the Commission or the lower court" (United Pet., p. 13) in rendering its jurisdictional conclusion.[6] United suggests that this Court compare the analysis of the facts in the decision of the Court below with that in the Commission's Opinion No. 610. Humble also respectfully requests that this Court make such a comparison for it will clearly reveal that the same essential facts with respect to the operation of the Green System

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[5] United's application in FPC Docket No. CP71-89 was "noticed" by the Commission on October 15, 1970. However, the Commission did not set the case for hearing until May 14, 1971. Hearings on United's application commenced on June 7, 1971, and concluded on June 18, 1971. The Commission waived the intermediate decision procedure and all briefs were filed with the Commission by July 30, 1971. Seven months later on February 9, 1972, approximately seventeen months after United filed its application and approximately one month after the Fifth Circuit's decision in Louisiana Power & Light Co. v. United Gas Pipe Line Co., *et al.* (See Motion *supra*, p. 2a) the Commission issued its Opinion No. 610 holding, *inter alia*, the Green System subject to its jurisdiction.

[6] United asserts in this connection that the record before the Fifth Circuit was for the "limited purpose of showing the nature of the issue which was pending at the Commission (citations omitted)" (United Pet. p. 13). But if this is true, it is beside the point. The important point is that regardless of how United tried its case, a record reflecting the essential operating characteristics of the pipeline facilities involved was before the Fifth Circuit for review.

were before both the Court and the Commission.[7] For example, both the Court and the Commission acknowledged that United had flowed small volumes of gas from its interstate Black System into its intrastate Green System (compare United App. A, p. 22a and United App. F, pp. 101a and 102a).

Similarly, the Court below stated that the Green System is located "entirely within the State of Louisiana" (United App. A, p. 22a) and that it is "particularly significant that this minor amount of interstate gas had been introduced *into* the Green system and that no intrastate gas could flow *from* the Green system into the Black system because of the pressure differential between the systems. Although a physical connection permits the Black to Green flow, *the two systems are otherwise entirely separate facilities*" (*ibid.*, emphasis added). This conclusion is supported by the evidence developed at the trial (R. 287; 296-298) and is also consistent with the record developed before the Commission in FPC Docket No. CP71-89.

It is upon these *essential jurisdictional facts*, among others, which were before both the Court and the Commission, that the Court concluded, on the basis of *Florida Parishes* (*supra*, n. 2, pp. 5-6), and other cases, that the Green System was not jurisdictional. There was simply no basic difference between the *essential jurisdictional facts* before the Court and the Commission.[8]

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[7] It should be noted that the Commission's conclusion in Opinion No. 610 (United App. F, pp. 104a-106a) that gas can flow outside of the State of Louisiana from the Green System is directly contrary to the evidence developed through United's witnesses in both the trial court (R. 275-276) and the hearings in FPC Docket No. CP71-89 (T. 323) wherein United's witnesses testified that gas flowing in the Green System could *not* leave the State of Louisiana.

[8] It is true, of course, that the Commission found that substantial volumes of interstate gas would have to be flowed into the Green System in the future (United App. F, pp. 102a-103a). This factor was also a matter of record before the Court below (R. 255-256) but

[Footnote continued on next page]

United asserts that the Court below applied the "wrong legal standard" in determining that the Green System was not jurisdictional (United Pet. p. 13). Thus, United asserts that the Court below relied solely on the "*de minimis* concept" in concluding that the Green System was not jurisdictional (United Pet. p. 13, n. 25). See, *e.g., Connecticut Light & Power Co.* v. *FPC*, 324 U.S. 515, 535-536 (1945); *FPC* v. *Florida Power & Light Co.*, 40 U.S.L.W. 4141 (January 12, 1972). However, it does not appear from the Court's opinion that the Court below relied exclusively, if at all, upon this concept in arriving at its jurisdictional conclusion. Rather, the Court below determined that the "channel of constant flow" of the gas produced, transported and consumed in the Green System did not make such System jurisdictional because such "channel of constant flow is an intrastate and not an interstate channel." (United App. A, p. 25a).

The principal cases upon which the Commission and United rely in support of their contention that this case involves an important issue of agency-court relations are basically inapposite to the essential circumstances of the case at bar. For example, both United and the Commission rely upon this Court's decision in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), wherein Bethlehem Shipbuilding Corporation, Ltd., among others, brought suit to *enjoin* the National Labor Relations Board from proceeding with hearings on a complaint alleging unfair labor practices against Bethlehem. The District Court granted the injunctive relief requested and such determination was sustained on appeal. This Court stated that the "question for decision is whether a fed-

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constitutes no ground for concluding that Commission jurisdiction over the Green System exists. If United will be required to flow substantial volumes of interstate gas into the Green System in the future, it should apply for a certificate and explain to the Commission and other interested parties precisely what transactions it will engage in which it believes will render the Green System jurisdictional.

eral District Court has equity jurisdiction to enjoin the National Labor Relations Board from holding a hearing upon a complaint filed by it against an employer alleged to be engaged in unfair labor practices prohibited by the National Labor Relations Act . . ." (303 U.S. p. 43) and held that the District Court was without power to so enjoin the Board (*id.* p. 47). Thus, this Court protected the agency's processes from unwarranted interference by the District Court.

Although Bethlehem had alleged that the provisions of the National Labor Relations Act were inapplicable to it because its business was not in interstate or foreign commerce, this Court noted that the exclusive "power 'to prevent any person from engaging in any unfair practice affecting commerce' has been vested by Congress in the Board and the Circuit Court of Appeals . . ." (*id.* p. 48), and stated that the Board could have determined whether Bethlehem's activities were in interstate commerce and Bethlehem should have exhausted its administrative remedies in this regard.

In sharp contrast, in the case at bar there was no attempt to *enjoin* the Commission from going forward with the certificate proceedings in FPC Docket No. CP71-89 and the Commission was not enjoined from holding such proceedings. Accordingly, there was no unwarranted interference by the Court below with the Commission's processes. Indeed, as Commissioner Carver stated in his dissent to Opinion No. 610 (United App. F, pp. 130a-131a):

> ". . . this Commission was not an original party [to the case before the Fifth Circuit] but chose voluntarily to intervene for the purpose of arguing its primary jurisdiction (footnote omitted). Knowingly and purposefully, it submitted to the jurisdiction of the courts which have so far considered the matter. 'An administrative body which submits a legal question to a court of competent jurisdiction is bound by

its judgment' *Otis & Co.* v. *SEC*, 176 F.2d 34 (CADC, 1948)."

Moreover, the Commission does not have "exclusive power" under the Act to determine the extent of its own jurisdiction. This was recognized by the Court below when it stated in another context that it would be a "strange, Frankenstein sort of legislative delegation that would empower the agency it creates to declare its own extent" of jurisdiction (United App. A, p. 26a). Finally, unlike *Myers*, the Court below had a record before it on the question of the jurisdictional status of United's Green System which did not require expert administrative analysis but rather expert legal analysis which the Court legitimately performed.

This Court's decision in *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, 370 U.S. 173 (1962), is equally inapplicable to the circumstances of the case at bar. There, a state trial court had asserted jurisdiction over a labor dispute which was arguably within the jurisdiction of the National Labor Relations Board and had enjoined the Marine Engineers Beneficial Association and its Local 101 from, *inter alia*, picketing the Interlake Steamship Co. The trial court's injunction was sustained by the Minnesota State Supreme Court which had determined that the labor organizations involved "were not 'labor organizations' within the meaning of § 8(b) of the Labor Management Relations Act, . . . and therefore not subject to the unfair labor practice provisions of that section of the statute" (370 U.S. p. 174). This Court reversed and stated that "it has hardly been disputed, nor could it be, that the petitioners' conduct was of a kind arguably prohibited by § 8(b) (4) (A) of the Act and thus within the primary jurisdiction of the Board, if MEBA and Local 101 were 'labor organizations' within the contemplation of Section 8(b) generally (footnote omitted)" (*id.* p. 176-177). This Court held that it could foresee "no reason to assume that the task of inter-

preting and applying the statutory definition of a 'labor organization' does not call for the same *adjudicatory expertise* that the Board must bring to bear when it determines the applicability of §§ 7 and 8 of the Act, to substantive conduct. *Indeed, analysis of the problem makes clear that the process of defining the term 'labor organization' is one which may often require the full range of Board competence*" (*id.* p. 178, emphasis added). In this regard this Court alluded at various times to the "informed discretion" of the Board (*id.* p. 178, n. 6), the "policy considerations" which the Board must consider (*id.* p. 181) and the necessity of the Board to be "free in the first instance to consider the whole spectrum of possible approaches to the question" (*ibid.*) of what constitutes a "labor organization" under the Act. Moreover, as this Court noted, there was "persuasive evidence" that the petitioner was a labor organization within the scope of the relevant legislation and that the "state court was shown not simply the arguable possibility of Labor Board jurisdiction over the controversy before it, but that the Board had *actually determined* the underlying issue upon which its jurisdiction depended, i.e., that MEBA was a 'labor organization' for purposes of Section 8(b) of the Act" (*id.* p. 184, emphasis added).

The case at bar simply does not present comparable circumstances. In the first place, there was no question presented here which required the Commission's informed judgment, discretion or skill with respect to a finding that the Green System was nonjurisdictional. Nor did such a question require the application of national policy. Here, the jurisdictional question was solely one of law, which did not require agency expertise and which the Court had ample authority to decide.

CONCLUSION

Humble respectfully submits, for the reasons stated herein, that the Court below properly exercised its discretion in declining to invoke the doctrine of primary jurisdiction and in determining the jurisdictional status of the Green System and review of such narrow determination is simply not required. Accordingly, Humble respectfully requests that the Court deny United's and the Commission's petitions for writs of certiorari on this question.

Respectfully submitted,

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